IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 142 of 1992

Judgment reserved on 7.11.2007

Date of decision: 14.11.2007

State of H.P. **…Appellant.**

Versus

Piare Lal **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting? Yes

For the appellant : Mr. Som Dutt Vasudeva, Addl. A.G.

For respondent : Mr. Vinay Thakur, Advocate, vice Mr. T.R. Chandel, Advocate.

Surjit Singh, Judge

This appeal by the State is directed against the judgment of Sessions Court, whereby respondent Piare Lal, who was charged with and tried for offences punishable under Sections 302 and 307 of the Indian Penal Code and Sections 27/54/59 of the Arms Act, has been acquitted.

2. Case of the prosecution, as it emerges from the record, may be summed up thus. PW-2 Shankh Bahadur owed certain amount of money to the respondent, who shall hereinafter be referred to as accused. While the accused claimed that the money due to him was Rs.135, PW-2 Shankh Bahadur alleged that only a sum of Rs.12/- was payable by him to the accused. On 11.7.1989 the accused demanded the money from PW-2. The latter offered to pay Rs.12/-, but the accused did not accept the said amount and threatened that he would kill him. On 13.7.1989 around

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Whether reporters of the local papers may be allowed to see the judgment?

5.00 p.m., when Shankh Bahadur, accompanied by deceased Kishan Bahadur, was going towards his fields, the accused, who was grazing his cattle and was also carrying a gun, fired two shots at PW-2 Shankh Bahadur, which hit him on his legs and then two more shots one of which hit the deceased in his abdomen as a result of which he died on the spot. PW-2 Shankh Bahadur received pallet injuries. Bhagat Singh (PW-4) saw the incident. He went to village Summerkot, where deceased Kishan Bahadur's employer Devinder Singh lived and from there, accompanied by said Devinder Singh, went to Tikkari, where there is a Police Post, to report the matter to the police. Police reached on the spot the same evening around 7.30 p.m. and recorded statement Ext. PG of PW-4 Bhagat Singh. Spot was inspected. Inquest in respect of the dead body of Kishan Bahadur was conducted and report prepared. Dead body was sent for post mortem examination. The accused was arrested. He got recovered his gun and six live and four fired cartridges. He also produced a 'Khukhri', which he alleged to have picked up from the spot and which deceased Kishan Bahadur was allegedly carrying.

3. During the course of trial the accused admitted having fired four gun-shots, but claimed that the shots were fired by him in self-defence. He pleaded that a man by the name of Bihari Lal had two wives, named Bimla and Kalar Mani. On the death of Bihari Lal, a dispute arose between his aforesaid two wives about the right of succession and a case was filed in the Court of Sub Judge, Rohru. He (accused) took side with Bimla and appeared as a witness for her. This annoyed Kalar Mani and her sons Vinod Kumar and Devinder Singh as also Pw-4 Bhagat Singh, because Devinder Singh and Vinod Kumar are his nephews. Devinder Singh, Vinod Kumar and Bhagat Singh hired the deceased and PW-2 Shankh Bahadur to kill the accused because of his having given the statement in favour of Bimla in the aforesaid civil litigation. On the fateful

day both the deceased and PW-2 charged towards the accused, with Khukhries in their hands and proclaimed that they would drink his blood and eat his liver and that despite his having asked them to stop, they continued charging towards him and so he fired shots from the gun, which he was carrying, in self-defence.

4. Trial Court accepted the plea of the accused / respondent and acquitted him. State is not satisfied with the findings and the final verdict of the trial Court and so it has filed the present appeal. We have heard the learned Additional Advocate General, learned counsel for the accused/ respondent and gone through the record.

5. Trial Court has disbelieved the genesis of the incident, viz. a dispute between PW-2 Shankh Bahadur and the accused with regard to the amount of money payable by Shankh Bahadur to the accused. Trial Court has also noticed certain contradictions in the prosecution evidence. It has observed that from the cross-examination of the alleged eye-witnesses of the incident, produced by the prosecution itself as also the site plan Ext. PW-9/A, the plea of self-defence raised by the accused is, probabilized.

6. Before scrutinizing the evidence on record with respect to the alleged plea of self-defence of the accused, we may state that the standard of poof in the case of a defence plea including the plea that the case of the accused is covered by any of the General Exceptions in the Indian penal Code is not the same as is required for holding an accused guilty of the charge. For holding a person guilty of a charge, rule of strict proof is applicable, that is to say, the burden of proof is on the prosecution to prove the charge beyond

reasonable doubt. In the case of a defence plea, including the plea that the case is covered by any of the General Exceptions in the Indian penal Code, the principle of preponderance of probabilities is applicable. No doubt Section 105 of the Evidence Act says that the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian penal Code or within any Special Exception or proviso contained in other part of the same Code or in any law defining the defence, is upon the accused and the Court shall presume the absence of such circumstances, but there is a catena of judicial precedents that in the case of proof of a defence plea or the plea that the case is covered by the General Exceptions or any other Exceptions, the principle of preponderance of probabilities and not the rule of strict proof applies and that the accused can show by reference to the circumstances transpiring from prosecution's own evidence that his case is covered by any of the Exceptions under the Indian penal Code or any other penal law. Reference in this behalf may be made to **Periasami and another vs. State of Tamil Nadu,** [(1996) 6 SCC 457]; **Rizan and another vs. State of Chhatisgarh,** (AIR 2003 SC 976); **James Martin vs. State of Kerala,** [(2004) 2 SCC 203]; **State of M.P. vs. Ramesh,** [(2005) 9 SCC 705]; **Surendra and another vs. State of Maharashtra**, [(2006) 11 SCC 434].

7. In the present case there are a number of circumstances as also specific evidence indicating that the accused / respondent fired the shots in self-defence. Prosecution examined PW-5 Sumeen Kumar alias Tikkmi, who claimed to have witnessed

the occurrence. This witness admitted in cross-examination that the deceased and PW-2 Shankh Bahadur were running towards the accused and the latter was shouting that they should stop, but they did not. He also stated that the deceased was at a distance of about ten meters from the accused when he fired the shot. PW-4 Bhagat Singh in his cross-examination stated that when the first shot was fired and which hit PW-2 Shankh Bahadur on his legs, the distance between the accused and Shankh Bahadur was 150 meters and when the shot that hit Kishan Bahadur was fired, the distance between the accused and deceased Kishan Bahadur was ten meters. He further stated that when the first shot was fired, which hit PW-2 Shankh Bahadur, Kishan Bahadur was at a distance of about five meters from Shankh Bahadur and he was ahead of him. This part of the testimony of Bhagat Singh, when read along-with the testimony of PW-5 Sumeen Kumar, makes the defence plea quite probable. The two statements show that the deceased and PW-2 Shankh Bahadur were charging towards the accused / respondent and he was shouting that they stopped, but they did not pay any heed to his shouts and continued charging at him and because of that he fired a shot aiming at the legs when they were at a distance of 150 meters and that shot hit PW-2 Shankh Bahadur and even after the firing of that shot the deceased continued charging at the accused and when he reached a very close, i.e. just ten meters to him (the accused), he fired another shot, which hit him in the abdomen.

8. The next question that arises for determination is whether there was any real threat to the accused / respondent from the deceased and PW-2 Shankh Bahadur. It has come in the evidence that the deceased had scabbard of Khukhri tied to his waist, when his dead body was taken for post mortem examination. Reference in this behalf may be made to the post mortem report Ext. PB. The accused himself produced a Khukhri to the Investigating Officer immediately after his arrest on the very day of his arrest. It had two dent marks on its wooden haft. The plea of the accused is that the Khukhri was in the hand of the deceased and he was charging towards him with that Khukhri and that one shot fired by him hit the deceased on his right-hand and the handle of the Khukhri as a result of which Khukhri fell from his hand and he picked it up and carried it home and produced the same to the police. This plea is also probabilized by the post mortem report Ext. PB, per which there were six punctured round wounds on the dorsum of the right-hand of the deceased. The Khukhri was sent to the Central Forensic Science Laboratory and the Director of the said Laboratory, vide report Ext. PO, opined that the dent marks on the haft of the Khukhri could have been caused by striking of pallets on firing.

9. It has also come in the evidence, per testimony of PW-4 Bhagat Singh that there was a dispute between Kalar Mani and Bimla about the right to succession of the estate of Bihari Lal and that Kalar Mani and her sons Devinder and Vinod Kumar claimed exclusive right to inherit the estate of said Bihari Lal, while Bimla and her children claimed that they too were entitled to inherit his estate

and that litigation was going on between the parties in the Court of Sub Judge, even though he expressed ignorance if Piare Lal appeared as a witness on behalf of Bimla. It has also been admitted by one of the witnesses of the prosecution, namely PW-2 Shankh Bahadur that on the day of the occurrence Devinder Kumar, Vinod Kumar and Joginder had visited his Dera. The relevant portion of his statement is reproduced below:-

> "It is incorrect to suggest that Devinder and Vinod Kumar (sic) and Joginder were not in my Dera on the day of occurrence. Again said, that Devinder and Vinod Kumar and Joginder were in my dera before the incident."

The aforesaid statement of PW-2 Shankh Bahadur shows the presence of Vinod Kumar and Devinder Kumar, the two sons of Kalar Mani against whom the accused / respondent claimed to have testified in the civil litigation, at his Dera on the day of occurrence. The fact probabilizes the defence plea that it was at the instance of Devinder Kumar and Vinod Kumar (the two sons of Kalar Mani) and PW-4 Bhagat Singh that the deceased and PW-2 Shankh Bahadur charged towards the accused with Khukhries in their hands with a view to killing him. It may be stated here that the third person, who visited the Dera of PW-2 Shankh Bahadur, namely Joginder Singh, along-with Vinod Kumar and Devinder Kumar is a brother of PW-4 Bhagat Singh. PW-5 Sumeen Kumar alias Tikkmi, who also claims to be an eye-witness, is the son of said Joginder Singh.

10. Interestedness of Bhagat Singh (PW-4) in the prosecution of the accused / respondent is writ large on the record.

It is he who made the statement to the Police, under section 154 of the Code of Criminal Procedure and not injured Shankh Bahadur (PW-2), even though the injuries sustained by him, due to one shot, were simple in nature, per medico-legal report Ext. PE and the testimony of PW-1 Dr. A.K. Abhey, who conducted his medico-legal examination. No doubt, in the statement Ext. PG it is written by the concerned Police Officer that the statement was recorded at Summerkot, but PW-4 Bhagat Singh himself says that it was recorded after the police reached the spot. PW-2 Shankh Bahadur was also present on the spot at that time. No explanation has been offered by the prosecution why the statement of Bhagat Singh (PW-4) and not that of PW-2 Shankh Bahadur, under Section 154 of the Code of Criminal Procedure, was recorded.

11. It also appears from the evidence on record that Bhagat Singh (PW-4) who made the statement Ext. PG, under Section 154 of the Code of Criminal procedure, might not have been even present on the spot. Bhagat Singh in his own testimony as PW-4 says that he was present in his own ‘Dogri’, which is at a distance of about two hundred meters from the spot, when the incident took place, but PW-5 Sumeen Kumar alias Tikkmi says that Bhagat Singh was present near the Dera of Shankh Bahadur when the incident took place. Spot map Ext. PW-9/A shows that ‘Dogri’ of PW-4 Bhagat Singh and Dera of PW-2 Shankh Bahadur are situated at different places and are far away from each other. Also, there is no explanation for the non-recording of the statement of Bhagat Singh (PW-4) at the Police Post Tikkri, where he went to lodge the report in

the company of Devinder Kumar, per his own testimony. The incident is alleged to have taken place around 5.00 p.m. Statement of Bhagat Singh was recorded at 7.30 p.m. on the spot. Presence of Bhagat Singh on the spot is rendered doubtful by the testimony of PW-5 as noticed hereinabove. Taking into consideration all these facts and circumstances, the possibility that the earliest version given to the police, in the form of statement Ext. PG of PW-4 Bhagat Singh, is coloured and embellished and is the result of deliberations, cannot be ruled out.

12. The very genesis of the incident is proved to be nonexistent and this fact also makes the defence plea probable. Even though PW-2 Shankh Bahadur stated that there was a dispute between him and the accused with respect to the amount of money, which he owed to the accused, but a careful reading of his testimony shows that the story is not true. Initially PW-2 Shankh Bahadur testified that he owed only Rs.12/- to the accused but the latter claimed Rs.135/-. However, in the later part of his testimony he said that he had purchased two kilograms of meat from the accused in the month of Jeith and had paid Rs.50/- to him that very month and that the remaining amount of Rs.12/- had been paid to him by his wife. He stated that he had not purchased anything else from the accused nor did he owe any money to the accused except for the price of the meat. Now when Rs.50/- had been paid by PW-2 Shankh Bahadur himself and the remaining amount of Rs.12/- had been paid by his wife to the accused, where remained the question

of even Rs.12/- being payable by PW-2 Shankh Bahadur to the accused.

13. Again, while according to PW-2 Shankh Bahadur the alleged tiff over the payment of the money took place on 11th, according to his wife Sheela Devi (PW-3) and Sundri Devi (PW-6), it had taken place on the day of the occurrence, i.e. 13th July, 1989.

14. In view of the above discussion, we see no valid reason to interfere with the finding of the trial Court that the evidence on record pobabilizes the plea of right of private defence taken by the accused / respondent. Consequently the appeal is dismissed.

(Surjit Singh)
Judge

November 14, 2007 (BC)

(Surinder Singh)
Judge